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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 06-1679

ROBERT J. MURPHY

Plaintiff/Petitioner

v.

FEDERAL INSURANCE COMPANY

Defendant/Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari of the November 20, 2006 Judgment of the United States Third Circuit Court of Appeals, Nos. 05-1814, 06-1320, 06-1356 (Sloviter, Chagares, and Greenberg)

Michael J. Plevyak, Esquire
WHITE AND WILLIAMS LLP
One Westlakes
1235 Westlakes Drive, Suite 310
Berwyn, PA 19312-2416
(610) 251-0466

Edward M. Koch, Esquire
(Counsel of Record)
WHITE AND WILLIAMS LLP
1800 One Liberty Place
Philadelphia, PA 19103-7395
(215) 864-7000

Attorneys for Defendant/Respondent, Federal Insurance Company

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Has Petitioner presented a compelling reason for certiorari to review the award of summary judgment in this first-party property insurance case in favor of the insurer when the policy required Petitioner to cooperate with the insurer's investigation, the Petitioner repeatedly failed to do so, and such a lack of cooperation prejudiced the insurer in the evaluation of the insurance claim?

Suggested answer: No.

2. Is a compelling reason presented for purposes of certiorari when the courts below compelled the deposition of Petitioner's non-party wife when she was a named insured under the policy, had the same duty of cooperation as Petitioner, and was properly subpoenaed?

Suggested answer: No.

3. Should this Court accept certiorari to review the denial of a protective order to Petitioner's wife when she may have possessed relevant information, no marital privilege prevented her from offering her personal observations and knowledge, and she was otherwise fully competent to testify?

Suggested answer: No.

4. Should this Court accept certiorari to review whether summary judgment may be properly awarded for a discovery sanction when the courts below awarded summary judgment due to the Petitioner's failure to cooperate under the insurance policy and not for a discovery sanction?

Suggested answer: No.

LIST OF PARTIES

The Petition does not identify the list of parties. The parties to this proceeding are Plaintiff/Petitioner Robert Murphy and Defendant/Respondent Federal Insurance Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Federal Insurance Company states that it is a wholly owned subsidiary of The Chubb Corporation, which is a publicly traded company on the New York Stock Exchange.

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INTRODUCTION

This matter stems from a garden variety insurance coverage dispute between Plaintiff/Petitioner, Robert Murphy ("Murphy") and Defendant/Respondent, Federal Insurance Company ("Federal"). Murphy alleged that his home in Haverford, Pennsylvania, sustained storm damage in September 1999, and that these damages were covered under the first-party property portion of the insurance policy issued by Federal (the "Federal Policy" or "the Policy").

Despite Murphy's representations to the contrary, he continuously forestalled Federal's attempts to obtain even the most basic information concerning the insurance claim. Murphy refused to comply with conditions precedent to coverage and court orders to provide examinations under oath of his wife, Kathleen Murphy ("Mrs. Murphy" or "his wife"), and other family members who resided in the house during the time of the alleged loss. Due to Murphy's utter failure to cooperate with the investigation of the claim and discovery, Federal moved for summary judgment. On January 18, 2006, the District Court granted Federal's motion and formally entered judgment on January 24, 2006. (A. 22). The Third Circuit affirmed for substantially the same reasons relied upon by the District Court. (A. 6).

Murphy now seeks to invoke this Court's discretionary jurisdiction through the instant Petition for Writ of Certiorari. If this Court has trouble discerning the precise reasons Murphy advances for certiorari, it is not alone. As best Federal can discern, Murphy appears to present four issues. First, [1] the duty of cooperation was not a precondition to coverage under the Policy. See Petition at 12-14. Second, his wife – a named insured under the Policy but not a party to the proceeding – was not properly subpoenaed and the District Court improperly compelled her deposition. See Petition at 7-10, 18-24. Third, Mrs. Murphy's testimony was irrelevant and privileged. See Petition at 15-21. Fourth, Federal was improperly

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[1]Federal has reorganized these points for the sake of clarity and coherence.

awarded summary judgment as a result of a discovery sanction. See Petition at 10-12. In a style long on hyperbole and short on substance, Murphy contends that these alleged errors violated numerous rules of procedure, rules of evidence, the federal constitution, and state substantive law. Murphy is wrong.

The courts' opinions below are well reasoned, yet unremarkable for the basic legal principles they espouse. For example, the courts below held that, when an insured files an insurance claim, he has an obligation to cooperate with the insurer's investigation of the claim. If the insured fails to cooperate with the investigation in a manner which prejudices the insurer's evaluation or defense of the claim, then there is no coverage under the policy.

The courts below also held that a non-party who is properly subpoenaed has an obligation to comply with that subpoena. This is especially true when, in the investigation of an insurance claim, that non-party is a named insured under the policy who may have information relevant to the alleged claim.

The courts below also reasoned that an insured's spouse may offer testimony as to her personal observations and knowledge. An insured cannot file an insurance claim and then use any marital privilege with a co-insured as a shield to prevent the insurer from discovering the facts and circumstances of the alleged loss. To the extent that a marital privilege or spousal incompetency are implicated, then they can be preserved through appropriate objection, but do not afford a basis to ignore discovery altogether.[2]

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[2] The last issue pressed by Murphy – that the courts below improperly awarded judgment as a discovery sanction – is factually incorrect. Although Federal pursued discovery sanctions under Rule 37 of the Federal Rules of Civil Procedure as an additional basis for summary judgment, the courts below relied on the Murphys' non-cooperation with Federal's investigation and not on any discovery sanctions.

Contrary to Murphy's suggestion, these are well-established legal principles of American jurisprudence that are in full accord with the letter and spirit of rules of procedure, rules of evidence, the federal constitution, and state substantive law. Simply, no basis for certiorari exists in law or fact.

COUNTER-STATEMENT OF THE CASE

Although Federal is hesitant to burden this Court with an additional recitation of the case, Federal is duty bound to do so because Murphy's statement of the case contains numerous misstatements and misrepresentations of the facts.

A. THE FEDERAL POLICY

Murphy and his wife purchased, and were named insureds, on a policy of insurance issued by Federal. At the time of the alleged loss in September 1999, the Policy contained standard terms and conditions that defined, among other things, the Murphys' duties to cooperate in the investigation of a loss as well as the nature and scope of the coverage. The pertinent provisions of the Policy are discussed throughout this brief.

B. THE ALLEGED LOSS

Murphy alleged that on September 17, 1999, he sustained physical losses to the property located at 7 Coopertown Road, Haverford, Pennsylvania ("the Property"). Murphy contended that a tree fell and somehow caused physical damage to the Property included damage to cedar fencing, a swimming pool and its surrounding area, a bedroom, the garage roof, and ground floor areas.

C. MURPHY WAITED SIX MONTHS TO PROVIDE NOTICE TO FEDERAL

Murphy did not report the loss to Federal until March 2000 – some six months after it allegedly occurred. Although Murphy contended that he reported the claim earlier, cooperated in Federal's claim investigation, and provided information and inspections as

requested by Federal, he did not file in the District Court any sworn or unsworn declarations to verify those allegations as a matter of record, subject to the penalty of perjury. It is, nonetheless, undisputed that it was not until September 28, 2000 – over one year after the alleged loss – that Federal's representative first had an opportunity to inspect the Property.

When that inspection took place, there was nothing of the tree allegedly involved in the loss to show Federal's representative. Murphy claimed that there was not even a stump because the "tree was blown out of the ground and removed." He also claimed that the wood from the tree that he placed around his property had mysteriously dissolved. In addition, the garage and his sons' bedroom was repaired. Although Murphy is a lawyer, he failed to take any photographs of the alleged damage. He contended that he had three engineers out to look at the swimming pool, but did not have any reports as to their findings, did not know the names of two of them, and did not have any contact information for the third one.

D. FEDERAL ATTEMPTED TO INVESTIGATE THE MYSTERIOUS LOSS, BUT MURPHY FILED SUIT WHILE THE INVESTIGATION WAS ONGOING

Contrary to Murphy's repeated suggestions, Federal never confirmed the loss or accepted coverage under the Policy except for garage roof damage.[3] Instead, Federal attempted to fully investigate

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[3] Murphy attempts to prove the contrary by, among other things, submitting excerpts of the deposition of a Federal witness, Angela Baker Mulvey, along with a document. That material was not a part of the record below and therefore must be disregarded. Fed. R. App. P. 10(a); Branion v. Gramly, 855 F.2d 1256, 1260 (7th Cir. 1988), cert. denied, 490 U.S. 1008 (1989). In any event, the material does not suggest that Federal accepted the rest of Murphy's insurance claim but rather suggests only that Federal never issued a formal denial of the claim.

the facts and circumstances of the alleged loss since the inception of the claim. While Federal was still investigating the substance of Murphy's claims and was awaiting further information and documentation promised by Murphy, he commenced the instant lawsuit and alleged that Federal breached its contractual duties under the policy and committed bad faith.

Federal had requested an inspection of the Property by an engineer, but Murphy filed his lawsuit before he allowed the engineer to inspect the Property. Even then, the engineer was not allowed access to all parts of the Property allegedly damaged in the loss. Murphy's own correspondence confirmed that he was still submitting documentation in support of his claim after he filed his lawsuit and was still promising additional documentation and information.

E. FEDERAL CONTINUED ITS INVESTIGATION OF THE CLAIM THROUGH THE DISCOVERY PROCESS, BUT ITS INVESTIGATION WAS THWARTED BY MURPHY'S REPEATED FAILURES TO COOPERATE

When Murphy eventually filed his Complaint in this lawsuit, this case was removed to federal court. The progress of this case was impeded when Murphy moved to remand, which was denied by the District Court, and then took a premature appeal, which was dismissed by the Third Circuit Court of Appeals.

When the case returned to the District Court, Federal used the discovery process to continue its investigation of Murphy's insurance claim. Murphy impeded discovery, and thus, the further investigation of the claim, by refusing to answer interrogatories and document requests. As a result, Federal moved to compel answers and responses to same. After Murphy belatedly responded to Federal's interrogatories and document requests, Federal attempted to schedule the depositions of Murphy and his wife, which Murphy thwarted through constant re-scheduling, never once stating an

objection to the deposition of his wife or contending that the subpoena served in connection therewith had not been properly served. Several months later, Murphy outright refused to allow the deposition of his wife, which required Federal to file a motion to compel. Murphy and his wife responded with a motion for a protective order.

When Murphy eventually appeared for his deposition on November 17, 2004, Federal had its first opportunity to examine him under oath regarding his contentions concerning the alleged losses. At that time, Murphy contended that the tree that allegedly fell across his pool was 60-80 feet tall and 18 inches in diameter and was removed entirely by himself, without anyone else's knowledge, and before anyone saw it in its fallen state. Murphy also contended that the alleged damage to the interior of his home, including the damage to his sons' bedroom, had been repaired by a person for whom he had absolutely no contact information - no address, phone number, or cell phone number. Federal immediately requested the examinations under oath of the Murphy sons, who were residents of the household and would be expected to have knowledge of the alleged damage to the pool and to their bedroom. Murphy refused to provide the depositions of his sons and confirmed that a motion to compel would be necessary. Thereafter, Federal moved to compel the sons' depositions.

Federal's motions to compel the deposition of Mrs. Murphy and the Murphy sons were granted by the District Court. Federal scheduled those depositions in accordance with the District Court's orders. None of the deponents appeared in accordance with the District Court's orders.

Federal moved for summary judgment, or in the alternative, for dismissal for the failure to comply with discovery orders. The District Court awarded Federal summary judgment due to Murphy's failure to cooperate with Federal's investigation of the claim. The Third Circuit Court of Appeals affirmed. Murphy now seeks to invoke the discretionary jurisdiction of this Court through the instant Petition for Writ of Certiorari.

REASONS WHY CERTIORARI SHOULD BE DENIED

This Court grants discretionary certiorari only for compelling reasons and only in the rarest of cases. Sup. Ct. R. 10. Such compelling reasons include the presence of a conflicting decision, an important, novel, or unsettled federal question, or a substantial departure from existing law. Sup. Ct. R. 10. This case presents none of them. Instead, this case represents a circuit court's ordinary and correct interpretation of federal law on routine discovery issues and state law on well-established insurance issues.

I. MURPHY'S FAILURE TO COOPERATE WITH FEDERAL'S INVESTIGATION OF THE LOSS RESULTED IN NO COVERAGE UNDER THE POLICY

A. THE POLICY CONTAINED A DUTY OF COOPERATION

Murphy contends that cooperation in the investigation of the loss was not a condition precedent to insurance coverage, but rather only a potential "forfeiture" of coverage. See Murphy's Petition at 12-14.

An insured's failure to cooperate has been alternatively characterized as the failure of a condition precedent or a breach of a policy provision. Compare In re U.S.A. Elec., Inc., 120 Bankr. 637, 643 (Bankr. E.D. N.Y. 1990) (noting that the duty to cooperate goes to the very substance of the obligation of an insured, and is thus a condition precedent to the performance of the promise by the insurer to indemnify for an alleged loss); Pini v. Allstate Ins. Co., 499 F. Supp. 1003, 1004 (E.D. Pa. 1980), (holding that an insured's failure to adhere to policy conditions constituted an absolute bar to suit unless the insurer waived its right to rely on the provisions), aff'd, 659 F.2d 1070 (3d. Cir. 1981), with McCoy v. Travelers Indem. Co. of Am., 2002 U.S. Dist. LEXIS 27431, at *8 (M.D. Pa. Feb. 8, 2002) (noting that the lack of cooperation in the investigation of an alleged first-party loss constituted a material breach of a policy provision) and Ania v. Allstate Ins. Co., 161 F. Supp. 2d 424 (E.D. Pa. 2001)

(using a substantial prejudice standard for an insurer to be relieved of the obligation to provide coverage due to an insured's failure to cooperate).

However characterized, an insured's cooperation in the investigation of a claim is necessary so that an insurer can make an informed decision regarding the existence, nature, and extent of coverage under the policy. McCoy illustrates this point. In McCoy, the plaintiffs-insureds operated a small business that was destroyed by fire. After the plaintiffs submitted a first-party insurance claim to their carrier, the carrier investigated the claim. During the investigation, a number of questions arose concerning the cause and origin of the fire and the financial well-being of the plaintiffs at the time of the loss. While the plaintiffs initially cooperated with the insurer's investigation, they quickly stopped cooperating and began obstructing the insurer's investigation as suspicions grew concerning the cause of the fire. For example, the plaintiffs initially signed authorizations that allowed the insurer to obtain their financial records, but later withdrew their authorizations and blocked the insurer's access to their financial information. The husband-plaintiff also refused to testify as to the cause of the fire during his subsequent examination under oath, which prevented the insurer from analyzing the veracity of the insured. The insurer was also unable to fully develop relevant information regarding the findings from the fire investigator retained by the plaintiffs. Moreover, while the insurer requested all relevant documents and information at the outset of their investigation, the insurer never had an opportunity to review all of the relevant information until two years after the loss. Finally, the plaintiffs' expert fire investigator was ultimately not used. Under these facts, the court held that the insurer was relieved from the obligation to provide coverage under the policy regardless of the applicable standard. Id. at **17-18. The court noted that, although the plaintiffs had ample opportunity to produce relevant records and cooperate in the investigation of the claim, they simply chose not to cooperate to the detriment of their insurer. Id. at *17. The court was particularly troubled by the continued delays occasioned by the plaintiffs, as "[a]n insurer is entitled to receive information relevant to a loss promptly and while the information is still fresh." Id. at *16. In view of the numerous circumstances of

non-cooperation by the plaintiffs, the court found that there were no triable issues of fact regarding the plaintiffs' cooperation, and thus the insurer was entitled to summary judgment. Id. at **17-18.

The two principal cases relied upon by Murphy – Brakeman and Rohm and Haas – concern notice provisions and not breaches of the duty of cooperation. In both cases, the court held that an insurer could not forfeit coverage due to the lack of notice unless it was prejudiced. Brakeman v. Potomac Ins., 472 Pa. 66, 371 A.2d 193 (1997); Rohm & Haas Co. v. Continental Cas. Co., 566 Pa. 464, 781 A.2d 1172 (2001). Even if a notice provision could be analogized to the duty of cooperation, the courts below found, as discussed more fully below, that Federal was relieved of any obligation to provide coverage because it was prejudiced in the investigation of the claim due to Murphy's repeated failures to cooperate in the investigation.

Thus, whether characterized as a condition precedent or the breach of a policy provision, there can be little dispute that an insured has a duty to cooperate with an insurer's investigation of the loss.

B. THE POLICY REQUIRED EXAMINATIONS UNDER OATH FROM MURPHY, HIS WIFE, AND THEIR SONS

A principal component of the Murphys' duty of cooperation under the Federal Policy concerned the provision of examinations under oath. The Policy required that Murphy, Mrs. Murphy, and their sons all submit to examinations under oath (*i.e.*, a deposition) if requested by Federal:

> **Examination under oath.** We have the right to examine under oath as often as we may reasonably require ***you, family members and other members of your household and have them subscribe the same.*** We may also ask you to give us a signed description of the circumstances surrounding the loss and your interest in it, and to produce all records and documents we request and permit us to make copies.

The term "you" is also defined in the policy:

> **You** means the person named in the Coverage Summary, and a spouse who lives with that person.

Both Murphy and his wife Kathleen were named insureds in the Coverage Summary of the Policy. Kathleen Murphy was also a "you" as defined in the provision pertaining to Examination Under Oath and, as a result, she contractually agreed to provide such an examination. Examinations under oath are not an option for the insureds, as the Policy stated that Murphy and his wife "must" comply. ("If you have a loss this policy may cover, you must perform these duties . . . ."). ***Notably, Murphy and his wife recognized in the record below the mandatory nature of this obligation when they admitted that "sworn statements from plaintiff's wife [are] mandated under the policy provisions."*** (A. 29).

Moreover, the term "family member" contained in the Examination Under Oath provision is defined in the policy as "your relative who lives with you, or any other person under 25 in your care or your relative's care who lives with you." Murphy acknowledged that there were two sons living in the house during the effective dates of the policy. In fact, one of the alleged areas of damages at issue in this litigation was the sons' bedroom.

There is simply nothing ambiguous or unclear regarding the contractual obligations under the Policy to provide examinations under oath of Mrs. Murphy and the Murphy sons. The District Court agreed that this conclusion was inescapable, reasoning that "[t]he fact the Federal Policy requires deposition testimony of Murphy's family is compelled as a matter of logic and cannot be reasonably disputed . . . . . The words in the Federal Policy could not be clearer; the Federal Policy requires examinations under oath." (A. 28-29). The Third Circuit affirmed for substantially the same reasons. (A. 18).

In summary, despite Murphy's baseless protestations, the Federal Policy clearly required Murphy, his wife, and sons to fully

cooperate in the investigation of the alleged loss. As part of that duty, Mrs. Murphy and the Murphy sons were required to submit to examinations under oath, but they refused to do so.

C. MURPHY FAILED TO COOPERATE IN THE INVESTIGATION OF THE ALLEGED LOSS

Both the District Court and the Third Circuit found that Murphy's refusal to cooperate during the investigation of the alleged loss hindered and prejudiced Federal's investigation. (A. 18-19, 30). The courts were particularly troubled by Federal's inability to depose Mrs. Murphy and the Murphy sons. (A. 18-19, 30).

To place this issue in context, it is important to note that Federal moved to compel the deposition of Mrs. Murphy and the examinations under oath of the Murphy sons after Federal's attempts to secure these examinations were ignored. Even after the District Court granted Federal's motions to compel the depositions of Mrs. Murphy and the two sons, Murphy and his wife refused to cooperate in scheduling these depositions and did not appear for them. When Federal subsequently scheduled the depositions with adequate notice to the parties, neither Mrs. Murphy nor the Murphy sons appeared. Instead, Murphy and his wife ignored the District Court's February 25, 2005 Orders, and filed an appeal to the Third Circuit. Although Murphy applied for emergency stays to both the District Court and the Third Circuit, the applications were denied. As a result, Murphy had no justifiable excuse for this defiance. Both Murphy and his wife admitted that her examination under oath was "mandated" by the Federal Policy.

The refusals to provide the required examinations under oath were but one example of tactics that could be charitably described as "non-cooperative." Murphy's tactics amounted to more than that, as he continually delayed, stonewalled, and obstructed Federal's investigation. Although there were numerous examples of these tactics in the record below, some of the more prejudicial instances include the following:

- Murphy did not provide notice of the claim to Federal until March 2000 – some six months after the incident allegedly occurred. By then, significant portions of the alleged damages were reportedly "repaired" or "altered," and Plaintiff had not taken nor preserved through photographs or otherwise, evidence of these alleged damages.

- Invoices and documentation of the alleged damages were submitted to Federal during the course of the last five years in a piecemeal fashion, and, for the most part, only in response to repeated discovery requests and/or after motions were filed with the District Court. In fact, the record clearly demonstrates that Murphy's repeated promises to supply additional information and documentation in support of his claim went repeatedly unfulfilled.

- While Murphy allowed limited inspections of the property after the claim was finally reported to Federal, Murphy subsequently refused to allow Federal full and timely access to all of the areas allegedly damaged. (A. 204-06, 375). Federal, nearly five-and-a-half years after the alleged incident, had an opportunity to fully examine the property with experts, and only after Murphy was ordered to do so by the District Court.

- Murphy refused all requests for a complete deposition of a witness, Joseph Mingioni, whom Murphy had earlier identified as a person with knowledge of the loss. The deposition was completed only after intervention by the District Court.

- Murphy commenced litigation against Federal without complying with all of the conditions precedent in the Federal Policy. Federal was actually waiting for the submission of invoices and documentation of the loss when Murphy filed the Complaint.

Despite this, Murphy first contends that he fully cooperated with Federal's investigation. See Murphy's Petition at 4-5. He states that he provided immediate notification of the loss (a contention simply unsupported by the record), provided some documentation, and he personally appeared for an examination under oath. In essence, he argues that the information he provided was enough. Murphy again conveniently ignores that he failed to provide examinations under oath of his wife and sons – the principal basis for non-cooperation advanced by Federal and relied upon by the District Court and the Third Circuit. Although he now contests the obligation to provide examinations under oath, he has admitted in this case that ***"sworn statements from plaintiff's wife [are] mandated under the policy provisions."*** (emphasis added). He further admitted that his wife and sons refused to voluntarily appear for their depositions. Therefore, Murphy did not comply with his duties under the Policy.

Murphy further contends that, assuming that his wife and sons failed to cooperate by not providing examinations under oath, any consequences should not be visited upon him as an "innocent" co-insured. See Petition at 14. Murphy never raised this issue before the District Court, and it is therefore waived. Harris v. City of Philadelphia, 35 F.3d 840, 845 (3d Cir. 1994) (noting that an issue cannot be raised for the first time on appeal). If the issue is somehow not waived despite appearing for the first time on appeal, it is frankly laughable that Murphy considers himself an "innocent" co-insured. Murphy appeared in this case in a number of capacities. He was a named party, he was his own attorney, and he was the attorney for his wife. In his capacity as attorney for his wife, he took every conceivable step to prevent Federal from taking her deposition – first by playing games with scheduling, then by requiring a subpoena, then by objecting to the subpoena when served, then by

opposing Federal's motion to enforce that subpoena, then by refusing to appear her for deposition despite a court order, then by moving for emergency stays (which were denied) pending appeal, then by taking an appeal of the order compelling her deposition. Murphy is hardly an "innocent" co-insured. Rather, he is the orchestrator of the obstructionist strategy. Therefore, he is not akin to the innocent co-insureds that were at issue in Giacobetti v. Insurance Placement Facility, 500 Pa. 447, 457 A.2d 853 (1983) (arson by one insured barred recovery by him and his children, but did not bar recovery by other beneficiaries to trust).

Apparent from the foregoing recitation is the unmistakable conclusion that Murphy failed to cooperate with Federal's investigation of the claim and that Murphy was the instigator of the obstructionist strategy. The repeated stonewalling of Federal's investigation meant that Murphy's insurance claim relied on little else than his own testimony. Under Pennsylvania law, however, Federal was entitled to conduct its own investigation.

D. THE LACK OF COOPERATION PREJUDICED FEDERAL IN THE DEFENSE OF THE CLAIM

As a result of the Murphys' failure to cooperate with Federal's investigation of the alleged loss, the courts below properly concluded that Federal was entitled to summary judgment.

A full and fair investigation, including examinations under oath from Mrs. Murphy and the Murphy sons, was critical given the strange and suspicious nature of some of his contentions and the complete lack of objective proof to support his claim. For example:

- Murphy allegedly removed a huge tree from his backyard without anyone else (including his family members) observing it or knowing about it.

- Murphy allegedly put the wood from the fallen tree on his property, but inexplicably, he contends the wood quickly dissolved and was

unavailable to be inspected by Federal's representative.

- The Murphy sons allegedly do not know about damages or repairs to the bedroom they slept in.

- The alleged interior damage was repaired by a person for whom Murphy has no meaningful contact information.

- Mrs. Murphy, a co-named-insured on the Policy, allegedly did not know anything about damage to the swimming pool, garage roof (which was replaced), backyard fence, and three interior rooms of the home in which she resided.

- Murphy had no photographic evidence of the alleged tree (before or after it fell) or the alleged damage to the garage roof and his sons' bedroom. This utter lack of photographic or other evidence of claimed damage is particularly odd given the fact that Murphy is an experienced trial lawyer, and thus, well aware of the importance of such evidence.

Murphy and his wife's failure to cooperate with the investigation, including the refusal to provide the requested examinations under oath, resulted in prejudice to Federal, which was properly decided as a matter of law. See, e.g., McCoy, 2002 US DIST LEXIS 27431 (granting summary judgment to insurer on the basis that insured failed to cooperate and that such failure prejudiced the insurer and thus relieved it from liability under the policy); Champion v. Chandler, 1999 U.S. Dist. Lexis 15824, at **5-6 (E.D. Pa. Sep. 28, 1999) (same); Hyde Athletic Indus., Inc. v. Continental Cas Co., 969 F. Supp. 289, 300 (E.D. Pa. 1997) (same); Metal Bank v. Insurance Co., 360 Pa. Super. 350, 520 A.2d 493, 498 (same), appeal denied, 517 Pa. 607, 536 A.2d 1332 (1987).

Without information developed through a full investigation, Federal was substantially hindered and prejudiced in its ability to challenge Murphy's assertions as to the existence and extent of the alleged loss. Federal was also denied the benefit of exploring any potentially relevant information that might have been uncovered by a full investigation, including the examinations under oath.

Given the manner in which Murphy positioned this suspicious claim, it is perhaps unsurprising that he went to such great lengths to block Federal's investigation. But he was wrong in doing so. Once Murphy filed the insurance claim, he had a duty to cooperate with Federal's investigation under the terms of the Policy. Once Murphy filed suit, he had a duty to cooperate with discovery under the Federal Rules of Civil Procedure. Yet Murphy chose to ignore both duties, and instead, employed an obstructionist strategy and complained that Federal and the courts should simply take him at his word.

The District Court and the Third Circuit keenly saw through such tactics. (A. 17-19, 31). The District Court eloquently reasoned "Murphy cannot have it both ways; he cannot bring an action for breach and fail to cooperate with its progression." (A. 31). The Third Circuit echoed these comments:

> [T]here is no escape from the conclusion that notwithstanding his denial that he has done so, Murphy has been obstructing the proceeding by not complying with the discovery orders and the insurance policy, thereby prejudicing Federal.

(A. 19).

Given Murphy's failure to cooperate with the investigation and adhere to the District Court's orders, Federal was properly relieved of liability under the Policy through well-established law.

II. THE DENIAL OF A PROTECTIVE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S JURISDICTION

Murphy next contends that this Court should grant certiorari to review the denial of a protective order to block the deposition of Mrs. Murphy. See Petition at 7-10, 18-24. Murphy advances a procedural argument discussed in this section along with a substantive argument discussed in the next section. Both arguments may be quickly and easily dismissed.

A. MRS. MURPHY WAS CONTRACTUALLY REQUIRED TO SUBMIT TO AN EXAMINATION UNDER OATH

As discussed previously, both Murphy and his wife Kathleen were named insureds in the Coverage Summary of the Policy. Murphy and his wife admitted that they had a duty under the Policy to provide such sworn statements. Kathleen Murphy's contractual agreement to provide an examination under oath required that she voluntarily appear for a deposition without a subpoena.

B. MRS. MURPHY WAS PROPERLY SUBPOENAED

In view of Murphy and his wife's admission that they have a contractual obligation to provide a sworn statement, Kathleen Murphy should have appeared for a deposition without the necessity of a subpoena, but she was subpoenaed anyway. Murphy argues that Mrs. Murphy was not properly subpoenaed, and thus the District Court exceeded its jurisdiction by compelling her deposition. See Murphy's Petition at 7-10, 18-24. Murphy is again wrong.

1. The Subpoena Was Properly Served

According to the subpoena's proof of service, which was included in the record below, the subpoena was hand-delivered to Kathleen Murphy's residence on May 3, 2004. The subpoena was accepted by a male adult who refused to give his name.

Murphy disputes the validity of the subpoena by alleging that it was not properly served. However, Murphy simply restates this allegation, as he did to the courts below, without ever coming forward with a properly verified statement from him or his wife to challenge the process server's proof of service.

Moreover, Mrs. Murphy had actual notice of the deposition because her husband was the Plaintiff, Robert Murphy. Robert Murphy is an experienced attorney who knew of Federal's intent to subpoena her since May 2004 when he received a copy of the subpoena and return of service.

2. A Witness Fee Was Tendered

Murphy again takes the position that no witness fee was tendered with the subpoena. This contention is inherently inconsistent with Murphy's position that no subpoena was served at all. How can he know whether a witness fee was tendered with the subpoena if no subpoena was served at all? But again, this statement is not true and Murphy provides no properly verified statement to the contrary.

When the witness fee became Murphy's cause *du jour* with regard to his wife's deposition, Federal obtained a declaration from the process server which was included in the lower court record. The process server declares under penalty of perjury that "I specifically recall tendering a check with the subpoena when it was delivered . . . ."

3. The District Court's Jurisdiction Was Properly Invoked Over Mrs. Murphy

Murphy cites approximately 25 cases, many without explanation, for the proposition that a district court's jurisdiction cannot be invoked over a non-party until a subpoena is properly served. See Petition at 8-10. Here, however, the District Court's jurisdiction was properly invoked over Mrs. Murphy because the subpoena was properly served.

III. THE DENIAL OF A PROTECTIVE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S DISCRETION

Murphy next contends that the District Court's Order denying a protective order for the deposition of Mrs. Murphy violated numerous rules of procedure, several amendments to the federal constitution, and state substantive law regarding marital privileges and spousal incompetency. Murphy is again wrong. As discussed at length in the previous two sections, Federal was fully within its rights to depose Mrs. Murphy.

What is more, as a resident of the insured premises, Mrs. Murphy may have had information relevant to the claim despite Murphy's unilateral protestations to the contrary. Moreover, no marital privilege prevented Mrs. Murphy from offering her personal knowledge concerning the alleged loss. Mrs. Murphy was also competent to testify in this manner because, as the courts below properly recognized, the spousal incompetency privilege cannot be used a shield to prevent discovery of the facts and circumstances of an insurance claim. Each of these issues shall be discussed, in turn.

A. MRS. MURPHY'S TESTIMONY WAS RELEVANT

In order to block his wife's deposition, Murphy advanced his subjective belief that his wife's deposition was not relevant because she allegedly was on vacation and not present at their residence when the tree fell, and as a result, she has no knowledge of the loss. In spite of Murphy's allegations and subjective beliefs about what his wife did or did not know, Kathleen Murphy's deposition was relevant for at least four reasons.

First, she was a co-named insured on the insurance policy at issue in this case. Thus, she was contractually required to submit to a deposition.

Second, she was an occupant of the premises with apparent knowledge of circumstances that are relevant to this claim, such as

the portions of the premises that allegedly were damaged, the extent of the alleged damages, the source of the damage, and other pertinent circumstances. At Murphy's pretrial discovery deposition, he admitted that his wife observed the conditions of the premises before she went on vacation and observed the alleged changed conditions of the premises allegedly related to the loss after she returned from vacation. She, therefore, has knowledge that could lead to the discovery of admissible evidence.

Third, Federal needed to explore the circumstances of her interest in the real and personal property involved in the loss so a determination could be made regarding whether she was an indispensable party. Murphy contended that his wife had no interest in the real property. Federal was entitled to test the veracity of this contention.

Fourth, and perhaps most importantly, the suspicious circumstances of this claim detailed above coupled with the complete lack of objective proof required that Federal thoroughly investigate the claim. This concern is heightened due to Murphy's assertion of a claim for bad faith against Federal.

The case of Holm v. Pollack, 2001 WL. 1257728 (E.D. Pa. Oct. 19, 2001) fully supports the District Court's decision to require the deposition to go forward and bears a striking resemblance to the facts of this case. In Holm, the defendant and his wife (a non-party in the case) sought a protective order to prevent the deposition of the defendant's wife on the alleged grounds that she could offer no relevant information regarding the issues in dispute because her involvement with the home renovation plans at issue was minimal and she allegedly was not involved with the plaintiff and his staff in any significant way. The court stated that such an argument was unpersuasive, even if the court was to ignore the defendant's admission that his wife was involved in the design of the kitchen and certain other rooms. Id. at *1. The court observed that the plaintiff was not required to take the defendant-husband's word about what his wife knew or did not know:

> In the present case, the Plaintiff's ability to rebut the allegations of the Defendant would be severely hampered if this Court took away his right to depose one of the two adults living in the house in question. The Plaintiff correctly states that the Defendant's conclusory and self-serving assessment of the knowledge of a potential witness does not impair the discoverability of that knowledge, however slight.

Id. at *3.

Like the wife in Holm, Murphy's wife in this matter did not claim any harm as a result of being compelled to testify. Rather, Murphy merely contended that his wife had no relevant information that would come out of her deposition to displace the alleged inconvenience of giving the deposition. But as observed by the court in Holm, a defending party's ability to rebut the allegations of the contending party about matters relating to the deponent's home would be severely hampered if the court takes away the defending party's right to depose one of the adults living in the house in question. A party's conclusory and self-serving assessment of the knowledge of a potential witness does not impair the discoverability of that knowledge, however slight. Id. at *3.

Murphy claims that his wife's deposition was not necessary because Federal's representatives had an opportunity to visit and photograph the premises and, thus, they allegedly have independent knowledge of the loss and damages. What Murphy fails to realize, however, is that he provided late notice of his claim (six months after it occurred) and that by the time Federal's representative first had an opportunity to visit the premises, significant portions of the alleged damage had already been repaired and in such a way that evidence of the cause of those losses was destroyed. No photographs were taken.

In summary, Murphy relied almost entirely on his own testimony to support his claim against Federal. Given those circumstances, one can understand why he wanted to pick and choose the evidence presented to Federal, including who would be

deposed. He, of course, wanted to avoid conflicting testimony with his account of the events. The Federal Rules of Civil Procedure, however, did not give him that power. Those who have knowledge or whose testimony might lead to the discovery of admissible evidence are proper subjects of the deposition process, including his wife, who was a resident of the subject premises and a co-named insured on the subject insurance policy.

B. THE MARITAL PRIVILEGE DID NOT PREVENT KATHLEEN MURPHY FROM OFFERING HER PERSONAL OBSERVATIONS AND KNOWLEDGE

Murphy next contends that his wife was incompetent to testify due to the marital privilege. See Petition at 15-21. Murphy fundamentally continues to misunderstand this limited privilege.

The District Court's procedural ruling requiring Kathleen Murphy to submit to deposition did not require the waiver of any marital privilege asserted by Murphy. Any marital privilege between Murphy and his wife would apply only to communications between them and not to his wife's independent personal observations and/or knowledge. As courts construing Pennsylvania law have repeatedly noted, such privileges might protect some testimony, but do not foreclose a spouse from being deposed regarding matters of which he or she has knowledge or information. Holm, 2001 WL 1257728, at *3; Puricelli, 2000 WL 760522, at *8; Caplan v. Fellheimer Eichen Braverman & Kaskey, 162 F.R.D. 490, 491-92 (E.D. Pa. 1995). Absent an intrusion into the protected realm of marital communications, a party is not prohibited from deposing the spouse of a party or any other potential witness. Holm, 2001 WL 1257728, at *3.

As also observed by the court in Holm, any marital privilege could have been sufficiently protected through traditional objections made at the deposition pursuant to the Federal Rules of Civil Procedure. Id.

Like Holm, the relevant factors here favored denying the protective order. Murphy and his wife did not show "a clearly defined and serious injury" that will result from Kathleen Murphy's deposition. As a result, her deposition was properly compelled by the District Court.

C. MRS. MURPHY WAS FULLY COMPETENT TO TESTIFY

Murphy next contends that his wife was incompetent to testify under Pennsylvania's spousal incompetency law, which, in limited circumstances, renders spouses incompetent from offering adverse testimony against each other. This new argument – asserted for the first time on appeal in the Third Circuit – is similarly without merit.

1. Mrs. Murphy Was Fully Competent to Testify In This Context

(a) Incompetency Is Limited Only to Adverse Testimony

As a threshold matter, it must be noted that testimonial exclusionary rules and privileges contravene the fundamental principle that "'the public . . . has a right to every man's evidence.'" Commonwealth v. Spetzer, 572 Pa. 17, 34, 813 A.2d 707, 717 (2002) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Id. (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

The oft-stated rationale for the spousal-incompetency rule is marital harmony. Id. at 34, 813 A.2d at 718. For this reason, Pennsylvania's spousal-incompetency rule, codified at Title 42, Section 5924 of the Pennsylvania Statutes, extends only to adverse testimony. This section provides, subject to certain exceptions, that "In a civil matter neither husband nor wife shall be competent to

testify against each other." 42 Pa. C.S.A. § 5924 (emphasis added). Testimony that is not "against" the other spouse is not incompetent. Id. It is only where the spouse testifies against the other spouse that the incompetency rule applies. Id. If a spouse testifies favorably or innocuously, there is no prohibition with respect to her testimony. Id. Thus, as summarized by Pennsylvania's supreme court, "a husband or wife is now deemed competent to testify against his or her spouse, but has a privilege to refuse to give adverse testimony, which he or she may waive." Spetzer, 572 Pa. at 34, 813 A.2d at 718.

Federal intended to take Mrs. Murphy's deposition – as it was contractually permitted to do under the Policy – because she was an occupant of the premises with apparent knowledge of circumstances that are relevant to this insurance claim, such as the portions of the premises that allegedly were damaged, the extent of the alleged damages, the source of the damage, and other pertinent circumstances. Federal also intended to explore the circumstances of her interest in the real and personal property involved in the loss so a determination can be made regarding whether she is an indispensable party. As a result, the purpose of Mrs. Murphy's deposition was not to elicit adverse testimony, but simply to explore her knowledge of the facts and circumstances that underlie this insurance claim.

(b) If Mrs. Murphy's Testimony Would Have Been Truly Adverse to Murphy in This Context, Then the Fraud Exception Was Triggered

To the extent that Mrs. Murphy's testimony would, in fact, have been different or adverse to Murphy's suspicious version of the events, then the fraud exception would have been triggered in this context. Brown v. Scafidi, 839 F. Supp. 342, 343 (E.D. Pa. 1993) (holding that a wife was deemed competent to testify to reveal her husband's fraudulent personal injury and legal malpractice suit). This exception is grounded on public policy, and applies to prevent spouses from aiding each other in the perpetration of a fraud. Kine v. Forman, 205 Pa. Super. 305, 310, 209 A.2d 1, 3 (1965). Thus,

Federal was entitled to depose Mrs. Murphy to expose a material misrepresentation; that is, a fraud.

(c) Incompetency Did Not Apply in This Action in Which Murphy Is Alleged to Recover for a Loss to Separate Property

Another exception to spousal incompetency is applicable where, as here, a spouse sues to recover separate property. Title 42, Section 5927, of the Pennsylvania States provides:

> In any action brought by either the husband or wife to protect and recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one or the other, unless this privilege is waived upon the trial.

42 Pa. C.S.A. § 5927.

The term "separate property" is not used in the statute in any technical sense, but rather, in a broad and comprehensive, sense. Morrish v. Morrish, 262 Pa. 192, 198, 105 A. 83, 85 (1918).

Here, Murphy contended – over and over again – in the courts below that the real property in question was his "separate property" and his complaint makes clear that this is an action to protect his property by having it repaired at Federal's expense. Therefore, the separate-property exception was applicable and Mrs. Murphy was fully competent to offer testimony in this case.

2. In Any Event, the Argument Was Waived Because It Was Asserted for the First Time on Appeal

Although Murphy opposed his wife's deposition on numerous bases, including confidentiality of marital communications under Title 42, Section 5923 of the Pennsylvania Statutes, Murphy never made a spousal-incompetency argument

under Section 5924 either in the District Court, or in his principal brief filed with the Third Circuit. This new argument is therefore waived. Harris, 35 F.3d at 845. As explained by this Court over 65 years ago, the issue is waived because the late assertion prevents the opportunity to develop a proper record before the district court:

> [T]he requirement to raise the issue below is] essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941); see also Singleton v. Wulff, 428 U.S. 106, 120 (1976) (noting that, when an argument was raised for the first time on appeal, "[w]e have no idea what evidence, if any petitioner would, or could, offer in defense [of the argument].").

Even assuming that this Court somehow finds that Murphy raised the spousal-incompetency argument under Section 5924 in the District Court – which he plainly did not – Murphy's failure to pursue the issue in his opening appellate brief in the Third Circuit nonetheless results in waiver. Ghana v. Holland, 226 F.3d 175, 180 (3d Cir. 2000) (finding issue raised for first time in reply brief waived, reasoning "Rule 28(a)(5) of the Federal Rules of Appellate Procedure and our Local Appellate Rule 28.1(a) requires appellants to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief."); Stern v. Halligan, 158 F.3d 729, 731 n.3 (3d Cir. 1998) ("A party cannot raise issues for the first time in a reply brief."); Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993) (same).

IV. THE COURTS BELOW DID NOT AWARD SUMMARY JUDGMENT AS A RESULT OF DISCOVERY SANCTIONS

Murphy next argues that the courts below erred by awarding summary judgment as a discovery sanction in violation of Murphy's

constitutional rights, including the right to due process of law. See Murphy's Petition at 10-12. Although the courts below would have been fully correct in awarding summary judgment as a discovery sanction for Murphy's obstructionist conduct, they did not do so. Rather, both courts found that Murphy's contractual breach of the duty to cooperate with Federal's investigation of the claim resulted in prejudice to Federal and thus no coverage under the Policy. (A. 18-19, 29-31). Certiorari cannot be invoked to review a ruling that was simply not made below.

CONCLUSION

This case represents a circuit court's ordinary and correct interpretation of federal law on routine discovery issues and state law on well-established insurance issues. No more, no less. Murphy has not presented any compelling reason for this Court to accept certiorari and, for these reasons, the petition should be denied.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: Edward M Koch

Michael J. Plevyak, Esquire
One Westlakes
1235 Westlakes Drive, Suite 310
Berwyn, PA 19312-2416
(610) 251-0466

Edward M. Koch, Esquire
(Counsel of Record)
1800 One Liberty Place
Philadelphia, PA 19103-7395
(215) 864-7000

Attorneys for Defendant/Respondent, Federal Insurance Company

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